

O

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NOMADIX, INC., ) Case No. CV 09-08441 DDP (VBKx)  
)  
Plaintiff, ) **ORDER GRANTING DEFENDANT'S MOTION**  
) **FOR PARTIAL SUMMARY JUDGMENT OF**  
v. ) **NONINFRINGEMENT**  
)  
HEWLETT-PACKARD COMPANY, a ) [Docket No. 681]  
Delaware corporation; )  
WAYPORT, INC., a Delaware )  
corporation; IBAHN )  
CORPORATION, a Delaware )  
corporation; GUEST-TEK )  
INTERACTIVE ENTERTAINMENT )  
LTD., a Canadian )  
corporation; GUEST-TEK )  
INTERACTIVE ENTERTAINMENT, )  
INC.; a California )  
corporation; LODGENET )  
INTERACTIVE CORPORATION, a )  
Delaware corporation; )  
LODGENET STAYONLINE, INC., a )  
Delaware corporation; ARUBA )  
NETWORKS, INC.; a Delaware )  
corporation; SUPERCLICK, )  
INC., A Washington )  
corporation; SUPERCLICK )  
NETWORKS, INC., a Canadian )  
corporation, )  
Defendants. )  
\_\_\_\_\_ )

Presently before the court is Defendant Hewlett-Packard  
Company's Motion for Partial Summary Judgment of Noninfringement

1 ("Motion"). Having reviewed the parties' moving papers and heard  
2 oral argument, the court grants the Motion and adopts the following  
3 Order.

4 **I. BACKGROUND**

5 Defendant Hewlett-Packard Company ("HP") seeks partial summary  
6 judgment that some of its accused devices ("Group 2 devices") do  
7 not infringe the patents of Plaintiff Nomadix, Inc. ("Nomadix").  
8 HP argues that it is entitled to summary judgment, because  
9 Nomadix's infringement contentions do not adequately set forth how  
10 the devices satisfy all of the required claim limitations. Nomadix  
11 asks the court to deny the Motion pursuant to Federal Rule of Civil  
12 Procedure 56(d) ("Rule 56(d)"), because HP failed to produce  
13 complete source code and a knowledgeable witness for the devices at  
14 issue. Nomadix also contends that genuine issues of material fact  
15 preclude summary judgment.

16 **II. LEGAL STANDARD**

17 Summary judgment is appropriate where "the movant shows that  
18 there is no genuine dispute as to any material fact and the movant  
19 is entitled to a judgment as a matter of law." Fed. R. Civ. P.  
20 56(a). Material facts are those "that might affect the outcome of  
21 the suit under the governing law." Anderson v. Liberty Lobby,  
22 Inc., 477 U.S. 242, 248 (1986). A genuine issue of fact exists if  
23 "the evidence is such that a reasonable jury could return a verdict  
24 for the nonmoving party." Id. The evidence must be viewed in the  
25 light most favorable to the nonmoving party, with all justifiable  
26 inferences drawn in its favor. Id. at 255.

27 The moving party "always bears the initial responsibility of  
28 informing the district court of the basis for its motion," and

1 identifying those portions of the pleadings, discovery, and  
2 affidavits that demonstrate the absence of a genuine issue of  
3 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).  
4 However, "[o]n an issue for which the opposing party will have the  
5 burden of proof at trial, the moving party need only point out  
6 'that there is an absence of evidence to support the nonmoving  
7 party's case.'" Regents of Univ. of Cal. v. Dako N. Am., Inc., No.  
8 C 05-03955, 2009 WL 1083446, at \*5 (N.D. Cal. Apr. 22, 2009)  
9 (quoting Celotex, 477 U.S. at 325).

10 Once the moving party meets this initial burden, "the  
11 nonmoving party must go beyond the pleadings and, by its own  
12 affidavits or discovery, set forth specific facts showing that  
13 there is a genuine issue for trial." Regents, 2009 WL 1083446, at  
14 \*5 (internal quotation marks omitted). It is not enough for the  
15 nonmoving party to rest on the "mere allegations or denials of his  
16 pleadings." Anderson, 477 U.S. at 259; see also id. at 252 ("The  
17 mere existence of a scintilla of evidence in support of the  
18 plaintiff's position will be insufficient . . . .").

19 Rule (56)(d) further provides that: "If a nonmovant shows by  
20 affidavit or declaration that, for specified reasons, it cannot  
21 present facts essential to justify its opposition, the court may:  
22 (1) defer considering the motion or deny it; (2) allow time to  
23 obtain affidavits or declarations or to take discovery; or (3)  
24 issue any other appropriate order." However, to obtain such  
25 relief, the nonmovant must also show that it "diligently pursued  
26 its previous discovery opportunities." Brocade Commc'ns Sys., Inc.  
27 v. A10 Networks, Inc., No. 10-CV-03428, 2012 WL 33836, at \*7 (N.D.

1 Cal. Jan. 6, 2012) (quoting Bank of Am., NT & SA v. PENGWIN, 175  
2 F.3d 1109, 1118 (9th Cir. 1999)).

### 3 **III. DISCUSSION**

4 For the patents at issue, Nomadix "bears the burden of proving  
5 infringement by a preponderance of the evidence." Warner-Lambert  
6 Co. v. Teva Pharm. USA, Inc., 418 F.3d 1326, 1342 (Fed. Cir. 2005).

7 "Direct infringement requires a party to perform or use each and  
8 every step or element of a claimed method or product." BMC Res.,  
9 Inc. v. Paymentech, L.P., 498 F.3d 1373, 1378 (Fed. Cir. 2007).

10 "An accused device cannot infringe, as a matter of law, if even a  
11 single limitation is not satisfied." Digital Biometrics v.  
12 Identix, Inc., 149 F.3d 1335, 1349 (Fed. Cir. 1998).

13 In its Motion, HP has pointed to an absence of evidence in  
14 support of the relevant claim limitations. As HP explains,  
15 Nomadix's infringement contentions are too conclusory to satisfy  
16 its burden as to these limitations. The contentions simply repeat  
17 the limitations language, and fail to identify "specifically where  
18 each limitation of each asserted claim is found within each Accused  
19 Instrumentality." N.D. Cal. Patent Local R. 3-1(c).<sup>1</sup> For  
20 instance, one of the claim limitations requires that HP's devices  
21 "intercept[], at the gateway device, the browser redirect message  
22 and modify[] it with the stored original destination address."  
23 (Wickey Decl. in Supp. of Mot., Ex. 1 at 15-16.) In its  
24 contentions, Nomadix repeats this language verbatim, adding only:  
25 "For example, the gateway device of the tested instrumentality  
26 intercepted the browser redirect message described above and

---

27  
28 <sup>1</sup> The parties adopted a modified version of the Northern  
District's Patent Local Rules.

1 modified it with the stored original destination address. The IP  
2 address 74.125.224.177 corresponded to http://74.125.224.177."  
3 (Id.) Such conclusory allegations are insufficient to create  
4 genuine issues of material fact as to the claim limitations, and HP  
5 has therefore met its initial summary judgment burden.

6 In response, Nomadix does not raise any legitimate dispute as  
7 to the inadequacy of its infringement contentions. Instead,  
8 Nomadix relies on a declaration from an attorney for its counsel of  
9 record. (See Decl. of Paul Main in Supp. of Opp'n to Mot.). The  
10 court finds that the declaration is also insufficient for Nomadix  
11 to avoid summary judgment. As an initial matter, HP argues  
12 persuasively that Nomadix had a duty to supplement its contentions  
13 with relevant source code, once HP produced the source code on  
14 September 7, 2011. See, e.g., Big Baboon Corp. v. Dell, Inc., 723  
15 F. Supp. 2d 1224, 1228 (C.D. Cal. 2010) ("Once source code has been  
16 provided to the plaintiffs, . . . courts have required plaintiffs  
17 to supplement their infringement charges with pinpoint  
18 citations."). As HP explains, neither Nomadix's contentions nor  
19 its declaration provide such citations. Nomadix responds, however,  
20 that its declaration sets forth sufficient Group 2 test results -  
21 as well as similarities to the accused Group 1 devices (for which  
22 Nomadix has provided source code citations) - for a reasonable  
23 trier of fact to infer that the Group 2 devices meet the relevant  
24 claim limitations, even without any source code citations.

25 The court need not resolve this dispute. As HP further  
26 explains, Nomadix cannot rely on its declaration to oppose this  
27 Motion. In particular, Nomadix did not disclose to HP the detailed  
28 test results and explanations on which the declaration relies,

1 either by attaching them to its infringement contentions or  
2 producing them as part of its ongoing discovery obligations. See  
3 Fed. R. Civ. P. 26(a) & (e). Because Nomadix "fail[ed] to provide  
4 information . . . as required by Rule 26(a) or (e)," Nomadix "is  
5 not allowed to use that information to supply evidence on a motion  
6 . . . unless the failure was substantially justified or is  
7 harmless." Id. 37(c)(1). Nomadix does not offer any justification  
8 for failing to fully disclose the test results and explanations.  
9 Nor is the error harmless, particularly in light of HP's continued  
10 insistence that Nomadix update its infringement contentions. With  
11 fact discovery now closed, HP reasonably relied on the facts set  
12 forth in the contentions and Nomadix's discovery responses, and had  
13 no opportunity to investigate the validity of the detailed test  
14 results and explanations set forth in the declaration. See Yeti by  
15 Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106-07 (9th  
16 Cir. 2001). Again, in the absence of the declaration - which the  
17 court must exclude - Nomadix has failed to raise genuine issues of  
18 fact as to the disputed claim limitations for HP's Group 2 devices.

19 Nomadix also argues, however, that HP failed to produce the  
20 complete source code and knowledgeable witness necessary for  
21 Nomadix to "present facts essential to justify its opposition."  
22 Fed. R. Civ. P. 56(d). Specifically, Nomadix contends that HP  
23 delayed producing the source code from March to October 2011, has  
24 yet to produce the complete source code, and refused Nomadix's  
25 October 2011 request to depose a knowledgeable witness. HP  
26 disputes this characterization of events, arguing that Nomadix's  
27 actions - particularly its refusal to update its infringement  
28 contentions - caused the delay.

1 The court need not resolve this dispute either. Even taking  
2 Nomadix's version of events as true, the court finds that Nomadix  
3 is not entitled to relief under Rule 56(d). Regardless of any  
4 initial delay, HP had provided at least some of the source code and  
5 refused to provide a knowledgeable witness, by October 2011.  
6 Nomadix therefore had at least two months to address these matters  
7 through the usual discovery process. Specifically, if Nomadix  
8 believed essential portions of the source code were missing, or  
9 that the witness deposition was necessary, it should have moved to  
10 compel this discovery, following a meet and confer with HP. A  
11 party cannot instead wait until the close of fact discovery and for  
12 its opponent to move for summary judgment - knowing that critical  
13 discovery was not provided - and then request additional time to  
14 conduct such discovery to oppose the motion. See Brocade, 2012 WL  
15 33836, at \*7. Accordingly, Rule 56(d) relief is not appropriate  
16 here, and HP is entitled to summary judgment of noninfringement for  
17 its Group 2 devices.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the court grants HP's Motion for  
20 Partial Summary Judgment of Noninfringement as to its Group 2  
21 devices.

22  
23 IT IS SO ORDERED.

24  
25  
26 Dated: March 1, 2012

  
DEAN D. PREGERSON  
United States District Judge